FILED
JUN 10 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1844

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE CENTRAL NATIONAL BANK
OF POTEAU, OKLAHOMA,
Petitioner,

vs.

COAL WASHER RENTAL CORPORATION,
a Pennsylvania Corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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June, 1983

QUESTION PRESENTED

1. Whether the trial court had the authority to instruct the jury on the issue of fraudulent misrepresentation under Rule 15(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A.

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COAL WASHER RENTAL CORPORATION,
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Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Respondent, Coal Washer Rental Corporation, would respectfully pray that this Honorable Court deny the Writ of Certiorari and not review the opinion of the Tenth Circuit Court of Appeals entered in the proceedings on the 20th day of January, 1983.

STATUTORY PROVISIONS INVOLVED

Federal Rules of Civil Procedure:

Rule 15. Amended and Supplemental Pleadings.

(b) Amendments to Conform to the Evidence:

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the

evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

STATEMENT OF THE CASE

In February of 1980, Ben Weerts, President of Respondent, Coal Washer Rental Corporation, and a citizen of Belgium, began negotiations with Bob Thompson, individually and Bob Thompson Enterprises for the sale of a certain coal washer plant. The coal washer plant is a large piece of equipment which enhances the value of coal by removing sulpher and ash. Bob Thompson, individually, and Bob Thompson Enterprises were in the business of buying and selling coal and ran the majority of their operation from Van Buren, Arkansas. The coal washer plant was to be delivered and installed in Van Buren, Arkansas by the Coal Washer Rental Corporation.

On the 4th day of February, 1980, Ben Weerts and Bob Thompson met at the Central National Bank of Poteau, Oklahoma, Petitioner, to finalize the negotiations. Thompson presented Ben Weerts with a joint contract for sale and escrow agreement labeled "Escrow Agreement" which

was to be signed by Weerts, Thompson and Tommy Miller, President of the Central National Bank of Poteau, Oklahoma. The Agreement is set out in Appendix B of Petitioner's Petition for Writ of Certiorari on file herein.

The Escrow Agreement stated that the purchase price of Six Hundred and Seventy Thousand Dollars ($670,-000.00) was on deposit, with the Petitioner as escrow agent, and would be paid to Respondent in three installments.

Petitioner's President, Tommy Miller, and Bob Thompson then confirmed that the money was deposited in the bank as the Escrow Agreement clearly specified. All parties then executed the Escrow Agreement and departed.

Respondent fulfilled the first provision of the contract, and on the 20th day of February, 1980, made arrangements for the first installment payment. Mr. Weerts then went to Poteau, Oklahoma to meet Mr. Thompson for the purpose of securing the payment. When arriving at Mr. Thompson's office, Mr. Weerts, for the first time, discovered that Mr. Thompson was tendering to him the first payment in cash. Mr. Weerts, after accepting the money, then drove immediately to Van Buren, Arkansas, where the money was deposited in a Ft. Smith bank for safekeeping.

The Respondent then began fulfilling the second provision of the contract by delivering the equipment to the construction site. Ben Weerts was at the job site, on or about the 26th day of March, 1980, attempting to obtain two pumps so the coal washer plant could be completed. In order to obtain the pumps, Mr. Weerts had to leave the job site to go to a nearby town. Mr. Thompson offered Mr. Weerts a ride in his pickup truck for the purpose of ob-

taining the pumps. While traveling in the pickup truck, Mr. Thompson informed Mr. Weerts that his second payment, Three Hundred Thousand Dollars ($300,000.00), was in a plastic trash bag on the seat. Mr. Weerts did not definitely identify the contents in the bag as being the money. The two gentlemen then proceeded to a local restaurant where Mr. Thompson stated that he needed to make a phone call and desired lunch. The two proceeded into the restaurant leaving the alleged $300,000.00 in Thompson's pickup. While in the restaurant, Mr. Weerts, at the urging of Mr. Thompson, signed a receipt for the $300,000.00 upon the condition that he could count it when he got back to Mr. Thompson's office. When the two returned to the pickup, the money had mysteriously disappeared.

Thereafter, there was a dispute between Mr. Weerts and Mr. Thompson concerning money due and owing on the contract. Consequently, on the 1st day of April, 1980, Respondent stopped all work on the coal washing plant. In retaliation, on the 7th day of April, 1980, Mr. Thompson sent a letter to Mr. Weerts informing him that he was barred from returning to the job site. Respondent, by and through his attorney, then sent a demand letter to the Petitioner, requesting the Four Hundred and Seventy Thousand Dollars ($470,000.00) which was due and owing under the Escrow Agreement, since Respondent had fulfilled all conditions under the contract but still remained unpaid. Petitioner refused to tender to the Respondent the $470,000.00, as per the Escrow Agreement, resulting in the filing of the initial lawsuit on the 28th day of April, 1980.

The case was eventually tried to a jury in October of 1980. Throughout the course of the trial evidence was pre-

sented to the jury showing that a representation had been made by Petitioner's President to Ben Weerts concerning the fact that the money was on deposit in the bank. Ben Weerts, relying upon said representation, signed the Escrow Agreement. The court, after the close of all the evidence, proposed a special interrogatory asking the jury to determine whether the bank had represented to Respondent's President that the money was on deposit.

Counsel for the Petitioner argued that very issue to the jury in closing argument; however, he also objected to the proposed jury instruction arguing that that issue had not been specifically pleaded. The jury came back with a verdict for the Respondent and the Petitioner appealed.

On appeal, the Court of Appeals for the Tenth Circuit affirmed, holding that the trial court had the authority to instruct the jury on the issue of fraudulent misrepresentation under Rule 15(b), Federal Rules of Civil Procedure. The Petitioner then acquired new counsel, filed its Petition for Rehearing and Suggestion for Rehearing en Banc, which was denied Petitioner is now before this Court on a Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, requesting that that Order be reviewed.

RESPONDENT'S ARGUMENT FOR DENYING A WRIT OF CERTIORARI

I.

THE PETITIONER WAS NOT PREJUDICED BY THE TRIAL COURT'S INSTRUCTION AND THE TRIAL COURT WAS JUSTIFIED IN SUBMITTING THE INSTRUCTION UNDER RULE 15(b), FEDERAL RULES OF CIVIL PROCEDURE.

The Petitioner alleges that it was prejudiced by the trial court's instruction, which Petitioner argues came as a complete surprise. The United States Court of Appeals for the Tenth Circuit has correctly addressed that issue in its Order. The United States Court of Appeals for the Tenth Circuit Order is set out in Appendix A of Petitioner's Petion for a Writ of Certiorari on file herein. At page 10 of that Order, the court states:

> "The bank thoroughly explored the representation issue of its case in chief and in its cross-examination of CWR's witnesses. Moreover, the Bank agreed to a special jury interrogatory requiring the jury to determine whether 'the defendant bank represented to Mr. Weerts that it had money for payment of the amount set forth in the escrow agreement'."

The Petitioner now comes to this Court arguing that the issue of the misrepresentation came as a complete surprise so that counsel could not argue his case intelligently. Again, the United States Court of Appeals for the Tenth Circuit correctly identifies this proposition as invalid on page 11 of its Order, footnote 3 as follows:

> "We likewise find no merit in the bank's belated contention that it was unaware the question of misrepre-

> sentation was an issue in the trial until the instruction was proposed. We agree that the amendment under Rule 15(b) may not be based on a issue tried inadvertently, and that the parties must have understood the evidence to be aimed at the unplead issue. See J. Moore, Moore's Federal Practice, ¶15.13[2] at 15-175 n.28 (2d ed. 1982). The record in this case contains several discussions among the parties and the court concerning the nature of CWR's representation theory before and after the defense put on its case. Although the parties and the court disagreed over whether the theory sounded in tort or in contract, everyone understood that the gravamen of the theory was misrepresentation."

Counsel for Petitioner went into the issue of the misrepresentation with its own President, Tommy Miller, and cross-examined Respondent's President, Ben Weerts, on the same issue. (Excerpt of Answer Brief of Appellee in the United States Court of Appeals for the Tenth Circuit, pages 7-10 set out in Appendix hereto.) It is thus clear from the record that the misrepresentation was a very important issue in the case and it is likewise true that Petitioner actually did try the issue to the jury.

The United States Court of Appeals for the Tenth Circuit was totally justified in affirming the trial court's action based upon Rule 15(b) of the Federal Rules of Civil Procedure. The giving of the instruction in no way resulted in prejudice to the Petitioner. The test of consent is whether the opposing party had a fair opportunity to defend and whether he could have presented additional evidence had he known sooner the substance of the amendment. *Ellis* v. *Arkansas Louisiana Gas Co.*, 609 F.2d 436 (10th Cir. 1979), *cert. denied*, 445 U.S. 964, 100 S.Ct. 1653, 64 L.Ed. 239

(1980). In the case at bar, the Petitioner not only had a fair opportunity to defend, but did defend and could not have presented any additional evidence, besides what was presented to the court. There was no prejudice to the Petitioner. See *Ward* v. *H. B. Zachery Const. Co.*, 570 F.2d 892, 897-98 (10th Cir. 1978).

II.

THERE WAS AMPLE TESTIMONY IN THE RECORD FOR THE COURT OF APPEALS TO RULE THAT THERE WAS AN "IMPLICIT AMENDMENT" OF THE PLEADINGS BASED ON IMPLIED CONSENT PURSUANT TO RULE 15(b), FEDERAL RULES OF CIVIL PROCEDURE.

Petitioner's attack on the United States Court of Appeals for the Tenth Circuit, stating that the appellate court has used "a post hoc rationalization in order to uphold a verdict without regard to the timeliness and seriousness of the issue injected by that 'implicit amendment' "; and that, "This disregard by the appellate court has resulted in the denial of fair and impartial judicial process to the Petitioner", is totally without justification or validity. (See Petitioner's Petition for a Writ of Certiorari, page 9.)

As stated previously, there was sufficient evidence for the court to apply Rule 15(b), Federal Rules of Civil Procedure. The law is also clear that consent will be found when the party opposing the amendment himself produces evidence on the new issue. *Hicks* v. *United States*, 486 F.2d 325, 329 (10th Cir. 1973), *cert. denied*, 416 U.S. 938, 94 S.Ct. 1939, 40 L.Ed. 289 (1974); *Knudson* v. *Boren*, 261 F.2d 15, 19 (10th Cir. 1958). Additionally, whether an issue was tried by implied consent is a matter within the sound dis-

cretion of the trial court whose judgment will only be reversed for an abuse of discretion. *Ellis* v. *Arkansas Louisiana Gas Co.*, supra; *de Haas* v. *Empire Petroleum Company*, 435 F.2d 1223 (10th Cir. 1970). However, notwithstanding any other rule of law, it is a fact that the trial court had a duty to instruct the jury on the misrepresentation issue. This point is evidenced in *Knudson* v. *Boren*, supra, where the United States Court of Appeals for the Tenth Circuit held at page 19 of their opinion:

> "Ordinarily the court is not limited to theories of counsel, but has the duty to determine the issues which are presented by the evidence properly before it."

This is exactly what the trial court did when it presented the special interrogatory instruction to the jury. The trial court's action was solely a matter of discretion and should not be reversed unless it can be shown that it abused such discretion. In this case there is no evidence before the Court that that discretion was abused.

CONCLUSION

The Respondent would respectfully show this Court that the Writ of Certiorari should be denied to the Petitioner since the trial court and the United States Court of Appeals for the Tenth Circuit were justified in holding that Rule 15(b), Federal Rules of Civil Procedure, was applicable to the case at bar. The misrepresentation issue was presented to the jury and the Petitioner actually litigated the issue. The Petitioner was not prejudiced by the instruction given and the court was obligated to instruct as it did. For the foregoing reasons and with the above cited

authorities, the Respondent respectfully submits that the Writ of Certiorari be denied to the Petitioner and that the decision of the United States Court of Appeals for the Tenth Circuit be allowed to stand.

Respectfully submitted,

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Counsel for Respondent

June, 1983

CERTIFICATE OF SERVICE

This is to certify that three (3) copies of the foregoing Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit were mailed with first-class postage prepaid to each of the attorneys for Petitioner, namely James D. Fellers, John Joseph Snider, Margaret McMorrow-Love, Richard F. Campbell III of FELLERS, SNIDER, BLANKENSHIP BAILEY & TIPPENS, 2400 First National Center, Oklahoma City, Okla. 73102; and James E. Hamilton of HAMILTON & WARREN, P.O. Box 608, Poteau, Okla. 74953, this ..... day of ....., 1983.

All parties required to be served have been served.

APPENDIX

[Excerpt from Answer Brief of Appellee in the 10th Circuit Court of Appeals]

* * * *

PROPOSITION NO. I

THE COURT HAD THE AUTHORITY TO INSTRUCT THE JURY ON THE ISSUE OF FRAUDULENT MISREPRESENTATION UNDER RULE 15(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE, 28 U.S.C.A.

The Appellant, The Central National Bank of Poteau, Oklahoma, in Proposition B of its Brief in Chief, alleges that the trial court erred in instructing the jury on fraudulent misrepresentation, (TR.Page 443) because Appellee, Coal Washer Rental Corporation, did not specifically plead fraudulent misrepresentation in its Complaint or in the Pre-Trial Statement. However, during the course of the trial there was sufficient evidence presented by the Appellee, through its President, Ben Weerts, and from Appellant's President, Tommy Miller, proving that there was a representation made by the Appellant's President to the Appellee which induced Appellee's President, Ben Weerts, to enter into a contract with Bob Thompson, to Appellee's detriment. This evidence was first brought to the Court and jury's attention through the direct testimony of Appellee's President, Ben Weerts, when he testified:

Q. "All right. Now, at that time was there any discussion held or any conversation about either the money or the contract?

A. "Mr. Miller said that — Mr. Miller said that he signed — wait a minute, I have to think about my wording to be clear. (Pause in time) Mr. Miller said that I did not have to have a copy and asked the contract will be signed, *the money was in the bank,* then why to have a copy. I insisted

and I said I am not going to sign any document if I don't have the copy because I want to know what I have signed. Then Mr. Miller, maybe before or after Mr. Thompson signed, I signed the contract and Mr. Miller signed the escrow account and both of them confirmed that the money was — and I can see Mr. Thompson saying the money is here into the bank and I was sure to have my payment. (Emphasis Added)

Q. "All right. Now, Mr. Weerts, did Mr. Miller go through the escrow or the contract and read it verbatim, or do you know?

A. "No, he did not go through, he just signed it. I supposed that he knew it."
(TR.Pages 85-86)

This line of questioning was not objected to by Appellant.

It is clear from the testimony that Appellant's President did make a representation to the Appellee's President that the money was in the bank; and because of the misrepresentation, the Appellee was induced to enter into the contract to its detriment.

The next evidence presented to the Court was Appellee's Exhibit No. 1, which was the Escrow Agreement (TR. Page 87). The contract provided that:

"Bob Thompson agrees to pay for such labor and equipment in the following manner, and to evidence his intentions has this date deposited with The Central National Bank of Poteau, Oklahoma, as escrow agent, the sum total of $670,000 to be held by the said The Central National Bank of Poteau, Oklahoma, with instructions for such sum to be paid to the seller as follows:" (Index, Vol. II, Page 1)

The contract is signed by all the parties, including Appellant's President, Tommy Miller (TR.Page 244).

Furthermore, Appellant's counsel went further into the issue when he questioned Appellee's President as follows:

Q. "Did you ask Mr. Miller if the money was on deposit?

A. "For sure I asked him.

Q. "And what did he tell you?

A. *"He said that the money was there, otherwise I was not going to deliver even not one bolt, one nut if I wasn't sure that the payment was secure."* (Emphasis Added) (TR.Page 144)

Consequently, there was evidence established at trial that substantiated a claim for fraudulent misrepresentation. The evidence was not objected to by Appellant and was even bolstered by Appellant when it ventured further into the issue by cross-examining Appellee's President on the representation made by Appellant's President. Rule 15(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. (herein referred to as Rule 15[b]), entitled "Amendments to Conform to the Evidence" reads as follows:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; *but failure to amend does not affect the result of the trial of the issues."* (Emphasis Added)

* * * *